Supreme Court, U.S.
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CASE NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

DOUGLAS L. FOWLKES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE EVIDENCE WAS SUFFICIENT TO CONVICT THE DEFENDANT ON A CHARGE OF VIOLATING 18 U.S.C. §666 IN LIGHT OF THE GOVERNMENT'S FAILURE TO PROVE THAT THE PAYMENT TO THE PUBLIC OFFICIAL WAS IN EXCHANGE FOR A SPECIFIC OFFICIAL ACT IN THE FUTURE OR A REWARD FOR A SPECIFIC OFFICIAL ACT UNDERTAKEN BY THE PETITIONER IN THE PAST.

II. WHETHER THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT A CONVICTION UNDER 18 U.S.C. §666 REQUIRES PROOF THAT THE PAYMENT TO THE RECIPIENT BE MADE IN EXCHANGE FOR A SPECIFIC QUID PRO QUO, OR AS A REWARD FOR A SPECIFIC PAST ACT.

LIST OF INTERESTED PARTIES

Douglas L. Fowlkes, Petitioner

United States of America, Respondent

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REFERENCE TO OPINION

The decision of the United States Court of Appeals for the Eleventh Circuit United States v. Fowlkes, 100 F.3d 970 (11th Cir. 1996)(table), is unpublished and is attached as Exhibit "A" to this petition.

STATEMENT OF GROUNDS OF JURISDICTION

Jurisdiction is proper in this Court as this is a Petition for a Writ of Certiorari from the decision of the United States Court of Appeals for the Eleventh Circuit. 28 U.S.C. §1254.

The Eleventh Circuit issued its decision on October 25, 1996 and the judgment was entered on that day.

RELEVANT STATUTE

18 U.S.C. §666, provides in relevant part:

Whoever, if the circumstances described in subsection (b) of this section exists --

* * *

(B)corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; shall be fined under this title imprisoned not more than 10 years or both.

NO. _____

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INTRODUCTION

This Petition invites the Court to interpret the elements of 18 U.S.C. §666 as it applies to public officials who are charged with receiving illegal payments in connection with their public duties. The

Petitioner argues that an essential element of the offense is that the money be received as compensation for some specific action, either already performed, or to be performed. In essence, Petitioner argues that §666 is a "bribery" statute. The government, on the other hand, argues that §666 is more akin to a "gratuity" statute. If the Petitioner is correct, then the government would be required to prove that there was a specific quid pro quo arrangement in connection with the payment. If the government is correct, then no quid pro quo is required.

On two prior occasions, this Court has addressed efforts by the government to prosecute public officials in connection with the receipt of bribes, and on both occasions, this Court has held that a specific quid pro quo is required to be shown. United States v. Brewster, 408 U.S. 501 (1972)(construing 18 U.S.C. §201, the federal official bribery statute) and McCormick v. United States, 500 U.S. 257, 111 S.Ct. 1807 (1991)(construing 18 U.S.C. §1951, the Hobbs Act). This case presents the Court the opportunity to add 18 U.S.C. §666 to the group of bribery statutes which require proof of a specific quid pro quo before a public official may be prosecuted.

STATEMENT OF THE CASE

PROCEEDINGS BELOW

On November 3, 1993, Douglas L. Fowlkes ("Buddy" Fowlkes) was indicted by a grand jury in the Northern District of Georgia (R1-1). On May 17, 1994, a fifty-five count superseding indictment was returned (R1-22) which charged Fowlkes with violations of 18 U.S.C. §666 (bribery) and 26 U.S.C. §7206(1) (false income tax return). Counts 1 through 49 charged violations of §666, alleging that Fowlkes received cash on forty-nine separate occasions (forty-nine months between January, 1989 and January 1993) in exchange for favorable treatment in his capacity as a City of Atlanta Councilmen. Counts 50 through 55 charged that in six separate years, Fowlkes failed to report the receipt of those cash payments, as well as other income he received on his personal income tax return.

In August, 1994, a jury trial was held before Hon. Robert L. Vining in Atlanta, Georgia. The jury returned a verdict of not guilty on forty-eight of the forty-nine bribery charges and a guilty verdict on one bribery charge. The jury also returned a not guilty verdict on three of the tax counts and a guilty verdict on three of the tax counts.

Fowlkes was sentenced on October 13, 1994 to serve forty-one months in prison (R2-47). On October 25, 1996, the Eleventh Circuit affirmed the conviction in an unpublished opinion (Appendix "A") 100 F.3d 970(11th Cir. 1996) (table).

STATEMENT OF THE FACTS

Buddy Fowlkes was first elected to the City Council of Atlanta in 1961 (R21-52-53). During his tenure in City Council, he served as the Chairman of various committees, including the Transportation Committee (R16-29).

In 1980, the city of Atlanta decided to expand the Hartsfield International Airport. Included in the new plan was a restructuring of the relationship between the various concessionaires at the airport and the city government. The new plan provided that one company (Dobbs Paschal Midfield Corporation, "DPMC") would be the principal concessionaire and would rent from the city virtually all of the space which was available to the various concessionaires (i.e., food vendors, newspaper vendors, shoe shine shops, lockers, telephones, etc.). DPMC would then sub-lease the space to sub-concessionaires who would actually sell merchandise to the public at the airport (R5-12-19).

Though the new plan was designed to eliminate the need of city officials to deal with the day-to-day problems of the vendors, almost from the beginning, the vendors complained that the rent was too high, the space too little and they needed relief. One such vendor was Harold Echols who owned various yogurt and ice cream shops at the airport, as well as hundreds of vending machines throughout the airport (R16-13-18).

Echols was the principal witness for the government in the trial of Buddy Fowlkes (R16). Echols' testimony, in summary, was that he regularly made cash payments to Buddy Fowlkes in the amount of $350.00 at breakfast meetings which they attended almost every week for years (R16-24-28). In addition, he purchased a tennis bracelet for Fowlkes' wife (R16-38-39); purchased plane tickets for Buddy Fowlkes and his wife to take a vacation in June of 1987 (R16-34,96); and finally, that he paid for Fowlkes to return to Atlanta from another vacation (and provided a rental car), so that Fowlkes could vote on a critical piece of legislation which resulted in a rent reduction for the sub-concessionaires in 1990 (R16-36-37, 96).

Echols testified that he gave the money and the gifts to Fowlkes because Fowlkes was an influential member of the City Council, including

being the Chairman of the Transportation Committee of the Council (R16-96).

In the fall of 1992, Echols was subpoenaed to the grand jury which was then investigating various allegations of corruption at the airport. After perjuring himself, Echols agreed to cooperate with the government's investigation. Thereafter, he taped certain phone calls with Fowlkes and taped two breakfast meetings which he had with Fowlkes, including one in January, 1993 at the end of which Echols gave $350.00 to Fowlkes.

Fowlkes denied receiving the cash from Echols on any occasion, other than on the one occasion in January, 1993 (R21-85). He admitted receiving the bracelet, but testified that he paid for it (R21-102). He acknowledged that Echols had paid for plane tickets for his vacation with his wife, but did not know that Echols had paid for the tickets until long after the vacation was over (R21-118). Finally, he acknowledged that Echols had paid for him to return to Atlanta to vote on the legislation in 1990 (R21-110-111). With regard to the money which he received in January 1993, Fowlkes testified that he believed that Echols gave him this money at the end of their breakfast meeting to purchase tickets to Fowlkes's retirement party which was being planned at that time (R21-85-95).

The indictment charged in Counts 1 - 48 that Fowlkes received approximately $350.00 per month from January 1992 through November 1993. The jury found the defendant not guilty on each of these counts. Count 49 charged the defendant with receiving $350.00 in January, 1993. This was the meeting which was surreptitiously taped by Echols and the F.B.I. The jury convicted the defendant on this count.

Because Fowlkes was acquitted at trial of taking any money in violation of §666 other than the one time in January, 1993, it is critical that at that point in time, there was no evidence that any legislation was pending before the Council. Moreover, the government introduced no evidence that Echols asked Fowlkes to do anything with regard to the airport during any meeting which was taped anytime near the date when the meeting occurred in January, 1993. Nor was there evidence that Fowlkes had in fact done anything with regard to the airport at any time in the recent past regarding the airport for which the payment of $350 could be considered a reward. Indeed, the transcript of the taped meeting of Echols and Fowlkes at the January 1993 meeting shows that Echols did not say anything about what the money was for. In fact, the testimony elicited by the government was that Echols never said anything to Fowlkes about the money:

Q.: Had you ever talked about actually giving the money to Mr. Fowlkes when you were giving him the money? Did you all talk about it?

A.: Never had a discussion with Buddy about the money I gave him, no, ma'am.

(R3-86-87) Echols testified that at their regular breakfast meetings, they would talk about anything, including the track team at Georgia Tech, because Fowlkes's principal employment was as the head track coach at the University (R3-26). While Fowlkes did testify that he gave the money to Fowlkes because he was an influential member of the City Council (R3-96), he never testified that he asked Fowlkes to do anything in particular for the money, or even to do anything generally for the money. Nor did he testify that he thanked Fowlkes for doing something in the past when he gave him the money. When asked why he paid the amount of $350.00, Echols responded, "I have no idea, Ms. Yates. It was just something that I started doing and I just kept it up." (R6-44).

The testimony at trial revealed that two critical pieces of legislation were passed by the City Council dealing with the airport after the initial contract was signed in the early 1980's. First was "Amendment 5" which resulted in a substantial rent reduction for the

subconcessionaires. This passed in 1987 (six years before the $350 was paid to Fowlkes) (R5-68-69). The second bill -- the one for which Fowlkes returned from his vacation on the plane ticket purchased by Echols -- was "Amendment 6", which also effectuated a rent reduction for the sub-concessionaires, as well as an extension of the overall agreement (R5-75-76). Fowlkes was in favor of both of these amendments to the principal concessionaire agreement.

The defense requested that the trial court grant a Rule 29 motion at the close of the government's case (R17-65, et seq.) and at the close of the evidence (R22-65). On the §666 count, the defense urged that the government had failed to establish any quid pro quo for the payment of the money from Echols to Fowlkes.

The defense offered a jury instruction relating to §666 which instructed the jury that one of the elements of this offense -- the "corrupt" state of mind -- required that the jury find that the payment of the money was accompanied by some expectation of a quid pro quo (R2-33). The trial court denied this request and a proper objection was made (R22-171-172).

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE 18 U.S.C. §666 COUNT BECAUSE OF THE GOVERNMENT'S FAILURE TO PROVE THAT THE PAYMENT WAS A PAYMENT FOR A SPECIFIC OFFICIAL ACT IN THE FUTURE OR A REWARD FOR A SPECIFIC OFFICIAL ACT UNDERTAKEN BY THE PETITIONER IN THE PAST

A. 18 U.S.C. §666 Requires Proof That The Payment Was In Exchange For A Specific Quid Pro Quo, Either In The Past, Or The Future.

Throughout the course of the trial, it was argued by the defense that in order to convict the defendant of a §666 violation, there must be proof that the defendant received the money with corrupt intent. Corrupt intent is virtually synonymous with the term "bribe" which requires a specific quid pro quo in exchange for the money. Because §666 is

patterned after the federal bribery statutes, to understand the scope of the conduct outlawed by 18 U.S.C. §666, a preliminary review of 18 U.S.C. §201, the federal bribery and gratuity statute must be undertaken.

18 U.S.C. §201 contains two prohibitions. First, it outlaws the payment of bribes to public officials. Second, it outlaws the payment of gratuities to public officials.

A bribe is a payment made in exchange for a specific quid pro quo. A gratuity, on the other hand, is a payment which is made -- usually after the recipient has performed some official act -- to reward the official for his vote, or other act. See generally United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir. 1974); United States v. Campbell, 684 F.2d 141, 148 (D.C. Cir. 1982). Payments made to foster "good will" in the recipient are characterized as "gratuities" not bribes. United States v. Head, 641, F.2d 174, 180 (4th Cir. 1981); United States v. Evans, 572 F.2d 455, 479-481 (5th Cir. 1978). In order to constitute a bribe, "The money must be given with more than some generalized hope or expectation of ultimate benefit on the part of the donor." United States v. Johnson, 521 F.2d 1073, 1076 (10th Cir. 1980); United States v. Strand, 574 F.2d 993, 995 (9th Cir. 1978)(Distinguishing "bribes" from "gratuities" -- the former requiring corrupt intent, the latter not containing

this element). In United States v. Niedenberger, 580 F.2d 63 (3rd Cir. 1978), the appellate court drew the distinction clearly:

> It is clear then, that [the bribery section of §201] requires as one of its elements a quid pro quo. In fact, we find this to be the primary distinction between [bribery and gratuities]. Support for this view is found in United States v. Brewster [supra] where the court, analyzing the differences between [the sections] held that the bribery section makes necessary an explicit quid pro quo which need not exist if only an illegal gratuity is involved.

Id. at 68-69. See also United States v. Secord, 726 F. Supp. 845, 847 (D.D.C. 1989).

Congress differentiated a bribe from a gratuity in §201 by using the term "corruptly" when characterizing the state of mind of the participants in a bribe, and omitting this element of the offense when defining the state of mind of the participants of a gratuity.

Thus, bribery requires that the payment be made or received corruptly to influence an official act. 18 U.S.C. §201(b). A gratuity merely requires that money be given or received other than as required by law for or because of an official act performed or to be performed.

In short, if the money is received with corrupt intent, it is characterized as a bribe and requires a specific quid pro quo. If the money is received other than as provided by law for, or because of an official act, it is a gratuity.

We turn, now, to 18 U.S.C. §666. When initially enacted in 1984, §666 mimicked the federal gratuity statute. It was designed to punish a broader scope of recipients of unlawful payments than §201. Instead of being limited only to federal officials, the new law encompassed individuals involved in any institution which received federal funds.

As originally enacted, §666 applied to whoever gives or receives anything of value "for or because of the recipient's conduct." This language closely mirrored the federal gratuity statute. If this case were brought under the 1984 version of §666, the trial court's ruling would be beyond attack.

In 1986, however, Congress amended §666 and added an element. Now the statute applies to "whoever corruptly gives or receives anything of value with intent to influence or reward the recipient in connection with any business or transaction or series of transactions." The addition of the "corruptly" element transformed §666 from a gratuity statute to a bribery statute. The 1986 amendment specifically removed the prior language

describing the motive of the payor ("for or because of the recipient's conduct") and replaced it with the more rigorous "influence" language employed in the bribery statute ("with intent to influence or reward"). Thus, Congress intentionally modified §666 to use virtually the same language which was used in the §201(b) bribery statute and thus manifested an intent that the quid pro quo requirement which was clearly an element of §201(b) jurisprudence would also be an element of §666. Under accepted rules of statutory construction, it is generally presumed that Congress, in drafting legislation, is aware of well-established judicial construction of other pertinent existing statutes. United States v. Jordan, 915 F.2d 622, 628 (11th Cir. 1990).

The Legislative History unmistakably evidences the intent behind this revision. 1986 U.S.C.C.A.N. 61138, 6153 (footnote 9), 1782, 1784. Congress wrote that §666 involved "theft or bribery concerning programs receiving federal funds" and that the 1986 amendment was designed to further limit the reach of the statute, and bring it in line with the Bank Bribery statute, 18 U.S.C. §215. Thus, to ascertain Congress's intent in amending §666, a review of the simultaneous legislative history of the Bank Bribery amendment is necessary. The legislative history unambiguously shows that Congress intended §215 to be a bribery statute:

> It seems only appropriate that the statute should explicitly require a corrupt purpose before bribery can be found. . . [T]his is the approach that we find in the Criminal Code with respect to public officials. If this is the standard of proof; if this is the mens rea that is necessary for conviction of public officials in such a situation, it seems to me that we ought not to ask anything less where we are talking about bank officials. Accordingly, the Committee on the Judiciary adopted this language adding the requirement of specific intent of the law, and therefore under this bill that we are to vote on today for bribery to exist, a gift will have to be given or received with a corrupt motive to influence a transaction in connection with the business of banking.

1986 U.S.C.C.A.N. 1782-89 (House Report 335). Because Congress expressly linked the §666 amendment to the §215 amendment and because the §215 amendment expressly requires a connection between the payment and a particular transaction (See United States v. McElroy, 910 F.2d 1016, 1021-22 (2d Cir. 1990)) the same must apply to §666.

As written in its final form, therefore, §666 must be construed consistent with the federal bribery statute and the bank bribery statute; not the federal gratuity statute. In short, there must be a specific quid pro quo.

The few cases construing §666 recognize that the law requires proof of a bribe and the corollary requirement of a specific quid pro quo. In United States v. Mariano, 983 F.2d 1150 (1st Cir. 1993), the court held that §666 is a bribery statute -- not a gratuity statute -- and thus applied the more punitive Sentencing Guideline which applied to bribery, as opposed to gratuities.[1] Mariano based its holding on the inclusion of the "corrupt" element of the offense in the 1986 amendment. Related to Mariano is the Second Circuit decision in United States v. Santopietro, 996 F.2d 17 (2d Cir. 1993), where the government persuaded the

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[1] Consistent with these cases, even the trial court in this case held that the bribery guideline was the appropriate sentencing guideline range, expressly rejecting Fowlkes' contention that the more lenient gratuity guideline was applicable. There simply is no way to harmonize the trial court's trial ruling, that the offense does not require a quid pro quo and that proof of the receipt of an unlawful gratuity is sufficient, with the sentencing ruling, that the more punitive bribery guideline applied, rather than the gratuity guideline.

appellate court that for sentencing guideline purposes, §666 is a bribery statute, not a gratuity statute. Again, the court reasoned that because "corrupt purpose" was an element of the offense, the law would be construed as a bribery offense, not a gratuity offense.

Finally, in United States v. Medley, 913 F.2d 1248 (7th Cir. 1990), the court held that §666 required proof of a specific quid pro quo.

The only cases which have held that §666 outlaws gratuities are three Second Circuit cases, United States v. Crozier, 987 F.2d 893 (2d Cir. 1993); United States v. Coyne, 4 F.2d 100 (2d Cir. 1994) and United States v. Bonito, 57 F.3d 167 (2d Cir. 1995). Both Crozier and Coyne applied the pre-1986 version of §666 -- the version which did not contain the "corrupt purpose" provisions. Bonito does not review any of the legislative history, focusing instead on whether the payment must be for a future act, or whether it can also be for a past act. Petitioner does not contest that §666 outlaws payments for future acts and compensation for past acts. The argument here is that the payment must be for some specific act, not simply a payment as an expression of good will. Thus, while Bonito does suggest that §666 outlaws gratuities, it does not remove the issue of whether there must be a specific quid pro quo or not.

In United States v. Paradies, 98 F.3d 1266 (11th Cir. 1996), the Eleventh Circuit considered whether the trial court erred in failing to instruct the jury on the quid pro quo element of the offense. However, because the defendant had not requested such an instruction, the appellate court's review was limited to determining whether this amounted to plain error. Id. at 1289. The court concluded that where the trial court expressly tracks the language of the statute, where there is no request for a quid pro quo instruction, it is not reversible error. See also United States v. Medley, supra. Here, of course, the defendant urged not only that the evidence was insufficient, because of the lack of any evidence of a quid pro quo, but also specifically requested a jury instruction explaining this concept to the jury.

Finally, the intent of Congress in enacting §666 can be discerned from the punishment which the sections impose: A conviction under the federal bribery statute (§201(b)) is punished by a term of imprisonment of fifteen years. A violation of the federal gratuity statute (§201(c)) is punishable by a term of imprisonment not exceeding two years. A violation of §666 carries a penalty of ten years. Surely, in enacting §666, Congress was seeking to address the type of conduct similar to the federal bribery statute, and not the less onerous conduct proscribed by the gratuity

statute. Yet, the government established no more in this case than -- at most -- a payment in exchange for future "good will", or a "thank you" for past supportive votes.

Recent developments in the construction of the Hobbs Act add further support to the proposition that §666 requires a specific quid pro quo. The Hobbs Act, 18 U.S.C. §1951, outlaws "extortion...under color of official right." In McCormick v. United States, 500 U.S. 257, 111 S.Ct. 1807 (1991), this Court held that a Hobbs Act violation requires proof that the payment was made by the briber and received by the recipient with a specific quid pro quo in mind. McCormick led to similar holdings in the Eleventh Circuit, United States v. Martinez, 14 F.3d 543, 552-54 (11th Cir. 1994); United States v. Davis, 30 F.3d 108 (11th Cir. 1994). The rationale of McCormick applies with equal force to §666 prosecutions involving elected public officials. Here, of course, there was no evidence that Echols paid money to Fowlkes in exchange for any specific official act. Echols's testimony to the effect that he paid the money to Fowlkes because he was an influential public official is meaningless: most political contributions are presumably made with a hope that they will influence powerful elected officials. This motivation, alone, cannot transform a payment into a bribe. What is needed, at a

minimum, is an understanding between the parties that the money is being paid in exchange for something in particular -- some vote in the Council, some drafting of legislation, something which the official can do in his official capacity in exchange for the money.

Here, the government offered no evidence that Echols asked Fowlkes to do anything and there was no reasonable inference to be drawn that this was silently understood, because there was, in fact, no evidence that any matter was then pending before the Council. If this payment is found to be corrupt, where there were no "strings attached", no anticipated quid pro quo, no "consideration" for the payment, then virtually all campaign contributions are equally corrupt. And this is precisely the overbroad interpretation which the McCormick Court condemned in the Hobbs Act context.

The weakness of the government's case can be recognized if the following is considered: If the payment from Echols to Fowlkes was a bribe, then presumably it would have made no difference if Fowlkes noted the payment on his campaign disclosure forms or not. That is, a bribe is a bribe, regardless of whether the recipient reports the payment as a contribution. Yet, if Fowlkes had reported this money on a campaign disclosure form -- or, for that matter, if he had immediately deposited the

money in his retirement party account -- the government would not seriously contend that this was a corrupt payment. The reason why this is so is because there was absolutely nothing said by Echols to Fowlkes at or near the time that the payment was made and there was no pending legislation affecting the airport at or near the time that the January 1993 payment was made. The fact that Fowlkes did not report the money on his campaign forms,[2] or did not immediately deposit the money in the retirement party account does not change this fact: because there was no basis for the jury to conclude that Fowlkes accepted the money with a corrupt intent, that is, with the intent that his official conduct would be influenced improperly, the evidence was insufficient to sustain the conviction.

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[2] The protagonist in McCormick v. United States, Mr. McCormick, did not report the payment that he received from the foreign doctors/lobbyists. This did not alter the result in that case: the government was still required to prove that there was a quid pro quo expected in exchange for the payment.

II.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT A §666 CONVICTION REQUIRED PROOF THAT THE PAYMENT TO FOWLKES WAS MADE WITH A SPECIFIC QUID PRO QUO IN MIND, OR AS A REWARD FOR A SPECIFIC PAST ACT

The defense offered a jury instruction which correctly set forth the quid pro quo element of the offense, as set forth above in Argument I. Specifically, in two separate charges, the defendant urged the court to instruct the jury:

> Now in determining whether there is proved beyond a reasonable doubt that he violated 18 U.S.C. §666, you should keep in mind that this section covers payments corruptly received as a reward for past acts, or as payment to influence Mr. Fowlkes's acts in the future. What is required is proof that the defendant accepted the payment, that is, the thing of value, from Harold Echols, with the intent to be influenced, or with the knowledge

that it represented a reward for some particular past action, or series of transactions on Mr. Fowlkes's part.

(R2-33 [Request #21]).

Not every gift, favor or contribution to a government or political official constitutes bribery. Bribery occurs only if the gift is coupled with a particular criminal intent. That intent is not supplied merely by the fact that the gift was motivated by some generalized hope or expectation of ultimate benefit on the part of the donor. Bribery imports the notion of some more or less specific quid pro quo for which the gift or contribution is accepted. The money must have been given by Harold Echols, and received by Mr. Fowlkes with more than some generalized hope or expectation of ultimate benefit on the part of Mr. Fowlkes [sic -- should read "Echols"].

(R2-33 [Request #22]).

Both of these Requests were rejected by the trial court. Instead, the court charged the jury as follows:

The elements of the offense, each of which must be proved beyond a reasonable doubt by the government, are:

(1) That the defendant, Douglas L. Fowlkes, was an agent of a local government which, in any one year, received benefits in excess of $10,000 under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of federal assistance;

(2) That he corruptly accepted or agreed to accept something of value from someone;

(3) That he did so intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such government; and

(4) That the business, transaction, or series of transactions of such government involved anything of value of $5,000 or more.

By definition, a bribe is money or favor bestowed on or promised to a person in a position of trust to pervert his judgment or influence his conduct.

To act "corruptly", as that word is used in these instructions, means to act voluntarily and deliberately

and for the purpose of improperly influencing any business, or transaction, or series of transactions of the government of the city of Atlanta.

(R22-162-163).

While these instructions correctly recited the verbatim elements of the offense, the charge failed to accomplish what was essential -- explaining to the jury that paying money to a public official, even with the hope that this will influence the public official, does not constitute bribery and is not illegal. When the N.R.A. pays huge amounts of money to Senator Phil Gramm, or when the health care lobbyists pay millions of dollars to legislators, or, for that matter, when Mr. McCormick received money from foreign doctors (in McCormick v. United States), or when Senator Brewster received money from a mail order house (United States v. Brewster), each of the donors presumably expected that the official would "come through" on some essential legislation and support his backers. This is the essence of political campaign contributions. What distinguishes an unlawful payment from a lawful payment to a politician, is the requirement that the payment from the donor is expected to "earn" a specific official act. This is the message contained in the defendant's

Requests To Charge and which was essential to the jury's understanding of the elements of the offense.

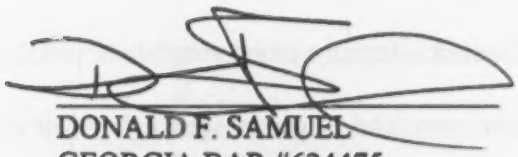
The defendant is entitled to a jury instruction which fully instructs the jury on the elements of the offense and alerts the jury to issues which could skew their deliberations or lead to a verdict based on a misinterpretation of the governing law.

For the reasons set forth in Argument I, supra, the statute which Fowlkes allegedly violated requires proof that there was a specific act which he was being asked to perform, or that he was being rewarded or compensated for a specific act which he performed in the past. The court's instruction did not explain this to the jury and the conviction on Count 49 cannot stand in light of this error.

CONCLUSION

For the foregoing reasons, the Appellant urges the Court to grant this Petition for a Writ of Certiorari and reverse his conviction on the §666 count and remand for further proceedings.

Respectfully Submitted,



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APPENDIX

[Do Not Publish]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 95-8804

D.C. Docket No. 1:93-CR472-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DOUGLAS L. FOWLKES, a.k.a. "Buddy",

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Georgia
(October 25, 1996)

Before BARKETT, Circuit Judge, DYER and HILL,
Senior Circuit Judges.

PER CURIAM:

Douglas L. Fowlkes appeals his conviction and sentence on one count of bribery under 18 U.S.C. §666 and three counts of filing false income tax returns under 26 U.S.C. §7206(1). Fowlkes

was a member of Atlanta's City Counsel from 1961 to 1993 and chairman of the Transportation Committee from 1986 to 1992, which oversaw Atlanta's Hartsfield Airport. The conviction for bribery arose from the allegations that Harold Echols, an owner of various concessions at the airport, slipped $350 into Fowlkes' coat pocket at weekly breakfast meetings in exchange for favorable treatment on issues and legislation. The conviction for filing false income tax returns resulted from the charges that over six years Fowlkes failed to report the receipt of these cash partnerships as well as other "gifts" from Echols. Upon conviction, Fowlkes was sentenced to 41 months imprisonment.

Fowlkes makes eight arguments on appeal:

(1) that 26 U.S.C. §666 requires that money be received as compensation for some specific action, not just for general favorable treatment as issues might arise, and that the evidence failed to show that Echols expected a quid pro quo for, or that Echols was rewarding Fowlkes for some specific action;

(2) that section 666 requires the Hartsfield Airport, not the City of Atlanta, to receive federal funds as an element of the offense;

(3) that the trial court should have instructed the jury that section 666 required a specific quid pro quo;

(4) that the trial court should have permitted the jury to consider an Atlanta city ordinance that did not prohibit the receipt of gratuities;

(5) that the trial court should have instructed the jury on Fowlkes' defense on the tax counts -- that, if Fowlkes acted in good faith, he could not be found guilty of willfully filing false tax returns;

(6) that the trial court erred in striking witness Tom Cordy's testimony attempting to attack the credibility of the government's chief witness, Echols;

(7) that the trial court erred by using the bribery sentencing guideline, which has a higher base offense level of 10 as opposed to the gratuity guideline, which has an offense level of 7;

(8) That the trial court erred in sentencing him to 36 months on the tax counts (to run concurrently with the 41 months imposed on the bribery count) when the guidelines called for a sentence in the 2-8 month range.

We have carefully reviewed the record in light of

Fowlkes' contentions and find no reversible error. Accordingly, the convictions and sentence are

AFFIRMED.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PETITION FOR A WRIT OF CERTIORARI has been served upon the Solicitor General of the United States, Roon 5614, Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530 by United States Mail Delivery with proper postage affixed thereon.

This the 22 day of January, 1997.

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Supreme Court, U.S.
FILED
APR 21 1997
CLERK

(2)

No. 96-1566

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DOUGLAS L. FOWLKES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO AMEND PETITION FOR CERTIORARI

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6 pp

Pursuant to Supreme Court Rule 21, petitioner Douglas L. Fowlkes respectfully moves for leave to amend his petition for certiorari in Fowlkes v. United States, No. 96-1566, to add a question on which the Court granted certiorari in another case in February of this year. In support of this motion, petitioner states as follows:

1. The petition in this case seeks a writ of certiorari to review the judgment of the Eleventh Circuit in United States v. Fowlkes 100 F.3d 970 (11th Cir. 1996) (reprinted as the appendix to the petition). The petition was received on January 23, 1997 and docketed on April 3, 1997. No response to the petition has yet been filed.

2. The petition currently raises one issue: whether the evidence was sufficient to convict the defendant on a charge of violating 18 U.S.C. §666 in light of the government's failure to prove that the payment to the public official was in exchange for a specific official act in the future or a reward for a specific official act undertaken by the petitioner in the past.

3. By this motion, petitioner seeks to add a second question to his petition, which would read as follows:

> 2. Whether 18 U.S.C. §666 is properly construed to reach bribery of state and local officials that does not relate to any disbursement of, or impingement on, federal funds.

This is the question on which the Court granted review in Salinas v. United States, No. 96-738, on February 24, 1997.

4. This question is squarely presented by this case. Petitioner Douglas L. Fowlkes has consistently challenged his conviction under 18 U.S.C. § 666 on the ground that the government failed to prove that the airport received any federal funds. App. 2a. The Eleventh Circuit rejected this argument, app. 3a.

5. Shortly after the filing of the petition in this case, this court granted certiorari in Salinas on two questions, one of which is:

> What kind of cases involving state employees are subject to prosecution under the Federal Bribery Statute, 18 U.S.C. §666? Do such cases include cases where no federal funds are disbursed or impinged.

Petition for Certiorari, Salinas v. United States, No. 96-739, at i.

6. The petitioner in Salinas argued that certiorari should be granted to resolve a conflict with the decisions of the Third Circuit in United States v. Cicco, 938 F.2d 441 (3d Cir. 1991), and the Ninth Circuit in United States v. Wyncoop, 11 F.3d 119 (9th Cir. 1993). Id at 6-7; see also Brief for the United States in opposition, Salinas v. United States , No. 96-739, at 9-12 & n.3.

7. Given that the Court will already be deciding in Salinas whether 18 U.S.C. § 666 should be construed to include a federal funding element, petitioner respectfully suggests that the Court examine the issue in the context of both cases.

8. There is no risk that respondent will be prejudiced by the proposed amendment to the petition. This motion is being filed and served on respondent within two weeks of the docketing of the petition for certiorari in this case.

9. The Court's ruling in Salinas, regardless of its outcome, will not completely resolve this case. The other issue on which petitioner has sought the Court's review is not presented in Salinas itself.

CONCLUSION

The motion to amend the petition for certiorari in Fowlkes v. United States, No. 96-1566 should be granted.

Respectfully Submitted,

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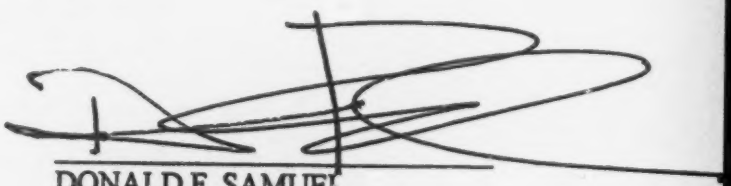
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION FOR LEAVE TO AMEND PETITION FOR A WRIT OF CERTIORARI has been served upon the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530 by United States Mail Delivery with proper postage affixed thereon.

This the 18 day of April, 1997.



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Supreme Court, U.S.
FILED
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No. 96-1566

In the Supreme Court of the United States

OCTOBER TERM, 1996

DOUGLAS L. FOWLKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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JOHN C. KEENEY
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18 pp

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 666(a)(1)(B), which prohibits the acceptance of a corrupt payment by an official of a local government agency that receives more than $10,000 in federal funds in a year, requires proof that each payment in a series of payments to an official influenced or rewarded a specific official act.

2. Whether Section 666(a)(1)(B) requires the government to prove that the corrupt payment affected or could have affected the federal funds received by the local government agency.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1566

DOUGLAS L. FOWLKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the judgment is noted at 100 F.3d 970 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1996. The petition for a writ of certiorari was filed on January 23, 1997. A motion to amend the petition for a writ of certiorari to add a question presented was filed on April 21, 1997, and is therefore out of time under this Court's Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on one count of accepting corrupt payments, in violation of 18 U.S.C. 666, and three counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1). He was sentenced to 41 months' imprisonment, to be followed by three years' supervised release, and was fined $25,000. The court of appeals affirmed. Pet. App. 1a-4a.

1. Petitioner was a member of the City Council of Atlanta from 1961 to 1993. Harold Echols was a subconcessionaire at Atlanta Hartsfield International Airport. Echols' rent depended upon the terms of the concession agreement between the City of Atlanta and the principal concessionaire, Dobbs Paschal Midfield Corporation. See Gov't C.A. Br. 2-4. The indictment alleged that, on 49 occasions, petitioner received cash from Echols, intending to be influenced or rewarded in connection with business or transactions of the City of Atlanta relating to concessions at the Airport. *Id.* at 2, 5-10; Superseding Indictment 1-2.

From 1986 through 1993, Echols made cash payments to petitioner, ranging from $100 to $350, at breakfast meetings, usually occurring weekly. During the period in which the payments were made, petitioner favored Echols' interests in matters before the City Council involving the subconcessionaires at the Airport. For example, in the summer of 1987, petitioner opposed the City's buyout of the principal concession agreement, which would have been unfavorable to Echols, but supported an amendment to the agreement that would have benefited Echols. Gov't C.A. Br. 7-8. Just before the debate and favorable vote

on that issue, Echols paid for the airline tickets for a vacation for petitioner and his wife. *Id.* at 7. In 1989, a further rent-reduction proposal was supported by petitioner and passed out of his committee, which oversaw matters relating to the Airport. *Id.* at 8. Petitioner issued a press release supporting the proposal. The 1989 proposal was tabled to allow consideration of the view of the incoming mayor. During the period of consideration, Echols gave petitioner a diamond bracelet for petitioner's wife. *Id.* at 8-9. In 1990, petitioner supported another amendment to the concession agreement that would have resulted in a rent reduction for Echols. When petitioner told Echols that he would be on vacation during the vote and would not return if he had to pay for the trip himself, Echols paid for round-trip airfare and a rental car so that petitioner could attend the vote. The amendment passed with petitioner's support. *Id.* at 9.

In 1992, Ira Jackson, who was the newly appointed Commissioner of Aviation and who was also accepting regular payoffs from Echols, proposed an entirely new concessions program. Jackson's proposal called for the termination of the concessionaire agreement and for substantial rent reductions for the subconcessionaires, including Echols. Despite the estimate of the City's Department of Finance that the new proposal would cost the City between $35 and $40 million, petitioner supported it. The proposal was abandoned when Jackson resigned as Commissioner of Aviation. Gov't C.A. Br. 9-10.

In late 1992, Echols began to cooperate with the FBI in the investigation of corruption in connection with the Airport. At a January 6, 1993, breakfast meeting with petitioner, Echols wore a hidden record-

ing device while the two men discussed the federal investigation and how to avoid detection. Gov't. C.A. Br. 11. After that breakfast meeting, Echols made his usual $350 payment to petitioner, which was captured on videotape and audiotape. *Id.* at 12.

2. The offense under Section 666(a)(1)(B) provides, in pertinent part:

> Whoever, if the circumstance described in subsection (b) of this section exists —
>
> > (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof —
> >
> > * * * * *
> >
> > > (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years or both.

The "circumstance described in subsection (b)" referred to in the first clause of Section 666(a)(1)(B) is that "the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). Accordingly,

to obtain a conviction under Section 666(a)(1)(B), the government must show (as relevant here) that (1) the defendant was an agent of a local government; (2) the local government received more than $10,000 in a year in federal assistance; (3) the defendant corruptly accepted something of value intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of the government; and (4) the transactions of the agency connected to the corrupt payment involved something worth at least $5,000.

At trial, petitioner requested a jury instruction that the government was required to prove that petitioner accepted payments from Echols "with the intent to be influenced, or with the knowledge that it represented a reward for some particular past action, or series of transactions on [petitioner's] part." Pet. 22-23. Petitioner also requested a charge that the bribery prohibited by Section 666 "imports the notion of some more or less specific quid pro quo for which the gift or contribution is accepted." Pet. 23.

The district court declined to give those instructions. Instead, in instructing the jury on the Section 666 offense, the district court tracked the language of the statute, charging that, to find petitioner guilty, the jury was required to find that he "corruptly accepted or agreed to accept something of value from someone, [and that] he did so intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of [the City of Atlanta]." Pet. 24; 8 Tr. 162. The court further instructed the jury that, "[b]y definition, a bribe is money or favor bestowed on or promised to a person in a position of trust to pervert his judgment or influence his conduct." Pet. 24; 8 Tr. 163. The court

also charged that "[t]o act 'corruptly', as that word is used in these instructions, means to act voluntarily and deliberately and for the purpose of improperly influencing any business, or transaction, or series of transactions of the [City of Atlanta]." Pet. 24-25; 8 Tr. 163.

The jury found petitioner guilty on the Section 666 count involving the payment captured on audio and video tape. Petitioner was acquitted on all the other Section 666 counts.

3. On appeal, petitioner argued that the district court had erred in refusing to charge the jury that Section 666 requires a *quid pro quo*, *i.e.*, that the payment represented an exchange or reward for a specific official act. Petitioner did not argue that Section 666 requires proof that the corrupt payment he received affected or could have affected the federal funds received by the local government agency for which he worked.[1] The court of appeals affirmed the

---

[1] Petitioner did argue on appeal that the government was required, and had failed, to prove that $10,000 in federal assistance had been received by the Atlanta Airport, rather than the City of Atlanta as a whole. Pet. C.A. Br. 30-31. Petitioner stated that "[t]he question raised by this appeal is whether the $10,000 may be received by the City in any of its programs, or whether the federal funds must be received by the agency which is involved in the bribe." *Id.* at 30. In making that argument, petitioner also stated that "the government failed to prove that the bribe had any [e]ffect (or was designed to have any effect) on an agency or program which received any federal funds." *Id.* at 31. That last statement, however, does not appear to have been an attempt to argue the precise issue presented in *Salinas* v. *United States*, cert. granted, No. 96-738 (Feb. 24, 1997), namely, whether a bribe punishable under Section 666 must be shown to have affected, or have had the potential of affecting, federal funds.

convictions in an unpublished per curiam memorandum. The court set forth the arguments petitioner had asserted on appeal and stated, "[w]e have carefully reviewed the record in light of [petitioner's] contentions and find no reversible error." Pet. App. 3a-4a.

DISCUSSION

1. a. Petitioner argues (Pet. 22-26) that the district court erred in refusing to give his requested jury instruction that Section 666 requires proof that a payment was accepted for some "particular past action or series of transactions" (Pet. 23) on the part of a government official. He also contends (Pet. 10-21) that the evidence was insufficient to show that the payment he took from Echols on January 6, 1993, was accepted in exchange or as a reward for a specific official act. Those contentions are without merit. The district court instructed the jury correctly on the elements of Section 666, and the evidence was sufficient to support the jury's finding of a corrupt payment under the proper instruction.

Section 666(a)(1)(B) punishes the receipt of a payment that is accepted corruptly, and with the intent on the part of the recipient "to be influenced or rewarded in connection with any business, transaction, or series of transactions" of the local government entity for which the defendant works. The government is required to prove that the recipient accepted the payment with the intent to be influenced in, or rewarded for, an *improper* official act. See *United States* v. *Medley*, 913 F.2d 1248, 1260 (7th Cir. 1990). The corrupt payment must be given to induce favorable action in the future, to reward favorable action taken in the past, or both. The difference between the two theories of liability under Section

666(a)(1)(B) is the relative timing of the corrupt payment and the official transaction or series of transactions to which it is connected: a corrupt payment intended to influence official actions is given before, and in connection with, official actions to be taken in the future, whereas a corrupt payment intended to reward official actions is given after, and in connection with, such actions taken in the past. See *United States* v. *Santopietro*, 996 F.2d 17, 20-21 (2d Cir. 1993), cert. denied, 510 U.S. 1092 (1994).

The district court correctly instructed the jury that Section 666(a)(1)(B) requires a connection between a corrupt payment and an improper official transaction or series of transactions. The court instructed the jury that it could convict petitioner only if it found that he had accepted Echols' payment corruptly, and "intending to be influenced or rewarded in connection with" city transactions. Pet. 24. It also charged that "[t]o act 'corruptly', as that word is used in these instructions, means to act voluntarily and deliberately and for the purpose of *improperly* influencing any business, or transaction, or series of transactions of the government of the [C]ity of Atlanta." Pet. 24-25 (emphasis added). And it further charged that, "[b]y definition, a bribe is money or a favor bestowed on or promised to a person in a position of trust to *pervert* his judgment or influence his conduct." Pet. 24 (emphasis added). Those instructions made clear to the jury that, to find petitioner guilty, it was required to find that he accepted money from Echols as a reward or inducement for taking improper official actions on Echols' behalf, and that there was a connection between the payment and the official transactions. There was no reasonable possibility that the jury would have

convicted petitioner if it had found that the payment he received was a legitimate loan, a proper campaign contribution, or a gratuity intended merely to cultivate general good will on the part of petitioner.

The evidence showed that the January 6, 1993, payment was one of a series of payments intended both to influence and reward petitioner in connection with acts he took in favor of Echols' business interests at the Airport. Petitioner was Chairman of the City Council's Transportation Committee at the time of the January 6, 1993, videotaped payment on which the count of conviction was based. He had taken numerous actions on Echols' behalf in his capacity as Chairman. Also, during the January 6, 1993, breakfast meeting at which the payment was given, petitioner and Echols discussed at some length the City's negotiation with Dobbs Paschal, the fact that negotiations had been ongoing for two years, and the fact that, under the terms of the Principal Concessionaire Agreement, the subconcessionaries had the right to remain at the Airport through 1995. Gov't C.A. Br. 31. The videotaped evidence of the payment thus supported a conclusion that Echols was continuing to pay petitioner for favorable actions that petitioner had already taken on his behalf in the past, as well as for favorable actions that petitioner would be in a position to take in the future. Petitioner was, in effect, "on retainer" while the cash payments were made in order to give Echols favorable treatment whenever concessions matters arose.

Petitioner appears to argue that the government was required to prove that each separate payment was given and received in exchange or as a reward for a separate official act. The statute contains no such requirement. Corrupt payments may be punished

under Section 666 if they are "rewards for past [actions] and bait for [future ones]." *United States* v. *Little*, 889 F.2d 1367, 1369 (5th Cir. 1989), cert. denied, 495 U.S. 933 (1990). Petitioner was, in effect, on Echols' regular payroll, accepting periodic payments to act in Echols' interests when concessions matters arose. Thus, each payment in the series was given and accepted in connection with all of the favorable actions that petitioner took on Echols' behalf in his official capacity during the relevant period. The fact that the illicit payments were made too frequently for each payment to be tied to one and only one particular act enhances, rather than diminishes, the corrupt nature of the payoffs. And although the jury found petitioner guilty only on the count arising out of the payment captured on videotape, the acquittals on the other counts do not vitiate the government's proof that the payment captured on videotape was one of a series of payments that, in combination, were intended to influence and reward petitioner with respect to acts in his official capacity favorable to Echols.[2]

---

[2] Petitioner suggests (Pet. 17) that *United States* v. *Medley*, *supra*, holds that Section 666 requires proof that a payment is accepted in exchange for a separate and discrete official act. That case, however, concerned a single $25,000 payment; the court did not address a situation involving a series of payments, nor did it suggest that each payment in a series must be linked to a separate official act. Cases involving retainer payments similar to those made in petitioner's case have found a violation of Section 666. See *United States* v. *Santopietro*, *supra* (corrupt payments received over several months); *United States* v. *Mariano*, 983 F.2d 1150, 1152 (1st Cir. 1993) (cash payments made over a substantial period of time); *Little*, 889 F.2d at 1369 (routine payoffs over a period of time).

b. Petitioner also argues that the proof in this case showed only that he received a gratuity for a past act, and not a bribe in exchange for a promise on his part to perform a specific official act in the future (Pet. 13-19). The case, however, was submitted to the jury on the theory that petitioner accepted the payment with the intent to influence *or reward* an official act. See Superseding Indictment 2. Thus, the jury could have properly found petitioner guilty if it concluded *either* that he corruptly accepted the $350 from Echols in connection with actions that he had already taken on Echols' behalf *or* that he accepted the payment corruptly intending to take actions on Echols' behalf in the future.

Contrary to petitioner's contention, the fact that liability may be based under Section 666 for corrupt acceptance of a reward for past acts does not blur the distinction between a corrupt payment and a gratuity. Although courts have occasionally referred to Section 666 as punishing gratuities, they have used that term only to make clear that Section 666 punishes corrupt payments given and taken in connection with past acts as well as acts in the future. "Thus, the current statute continues to cover payments made [or accepted] with intent to reward past official conduct, so long as the intent to reward is corrupt." *United States* v. *Bonito*, 57 F.3d 167, 170-171 (2d Cir. 1995), cert. denied, 116 S. Ct. 713 (1996); see also *United States* v. *Coyne*, 4 F.3d 100, 111 (2d Cir. 1993), cert. denied, 510 U.S. 1095 (1994); *United States* v. *Crozier*, 987 F.2d 893, 898-899 (2d Cir.), cert. denied, 510 U.S. 880 (1993).

Petitioner relies (Pet. 11-12) on a different statute, 18 U.S.C. 201, and to the distinction in that provision between bribes and gratuities. He also refers (Pet.

18-19) to the different punishments under Section 201 for the bribery and gratuity offenses. That distinction drawn under Section 201 between bribes and gratuities has little relevance to this case. Section 666 plainly requires that the payment must be corruptly received to influence or reward the defendant in connection with transactions of his government agency, whether the payment is made before or after the official acts. A defendant could not be convicted under Section 666 without proof that the payment was connected to an official transaction or series of transactions.

Referring to cases under the Hobbs Act, 18 U.S.C. 1951, such as *McCormick* v. *United States*, 500 U.S. 257 (1991), petitioner also argues (Pet. 19-21) that a strict *quid pro quo* requirement is essential to avoid punishing public officials for accepting campaign contributions. The requirement of Section 666 that the payment be "in connection with" the official transaction or series of transactions is sufficient to accomplish that objective. If petitioner had accepted the $350 payment not as a part of series of payoffs for his favorable acts, but rather as a campaign contribution, he could not have been found to have "corruptly" accepted it "intending to be influenced or rewarded in connection with any business, transaction, or series of transactions" of his agency, as required by Section 666.

2. In a motion for leave to amend his certiorari petition, filed outside the time for filing a petition for a writ of certiorari under this Court's Rule 13.1, petitioner seeks to raise the additional question whether Section 666 requires the government to prove that the bribes proscribed by the statute affected or could have affected the federal funds

received by the local government agency for which the defendant works. That is one of the questions presented in *Salinas* v. *United States*, cert. granted, No. 96-738 (Feb. 24, 1997). Petitioner did not raise that contention in the district court or in the court of appeals, and the court of appeals did not pass upon it in this case. In a companion case, however, also arising out of the bribe transactions involved in this case, the court of appeals has held that Section 666 does not require the government to show that a bribe could have affected federal funds. See *United States* v. *Paradies*, 98 F.3d 1266, 1288-1289 (11th Cir. 1996), petition for cert. pending, No. 96-1346.

The Court's decision in *Salinas* may affect the court of appeals' treatment of petitioner's conviction in this case. Accordingly, should the Court grant petitioner's motion to amend his certiorari petition, the petition should be held for the decision in *Salinas*, and then disposed of as appropriate in light of the decision in that case.[3] Should the Court hold in *Salinas* that Section 666 does not require the government to prove that the bribe affected or could have affected federal funds, then the petition should be denied. Should the Court hold in *Salinas* that Section 666 does contain such an element, then the court of appeals will be free on remand to consider whether petitioner has waived that argument, in light of his failure to raise it on his initial appeal.

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[3] We have suggested that the Court hold the petition in the companion case of *Paradies* pending the decision in *Salinas*.

CONCLUSION

As to the first question presented, the petition for a writ of certiorari should be denied. As to the question presented by the motion to amend the petition, the petition should be held for the decision in *Salinas* v. *United States*, No. 96-738, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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